ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Rules and Policies	)	IB Docket No. 95-168
for the Direct Broadcast	)	PP Docket No. 93-253
Satellite Service	)	

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc.

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Cox Enterprises, Inc. ("Cox") by its attorneys, and pursuant to Section 1.415 of the rules of the Federal Communications Commission ("Commission"), 47 C.F.R. § 1.415, hereby submits its comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes to adopt rules regarding the manner in which Direct Broadcast Service ("DBS") channels that have been reclaimed by the Commission should be reassigned and considers adopting new cross-ownership restrictions governing the provision of DBS service. Six years ago, in awarding DBS permits to several applicants, the Commission announced that in the event that any such permits were surrendered or revoked, the affected channels would be apportioned equally among the

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1/ *Revision of Rules and Policies for the Direct Broadcasting Satellite Service*, FCC 95-445, Notice of Proposed Rulemaking in IB Docket No. 95-168 and PP Docket No. 93-253 (rel. Oct. 30, 1995) ("*Notice*").

remaining permittees.[2/] Now for the first time, an authorization *has* been revoked, and the Commission has tentatively -- and correctly -- determined that its channel reassignment approach does not best serve the public interest.

The issue has arisen because of the Commission's recent decision to cancel the DBS permit that had been awarded to Advanced Communications Corporation ("ACC").[3/] The Commission determined that ACC had failed to proceed with sufficient due diligence to build and operate its authorized DBS system. To the extent that the Commission's due diligence requirements are intended to ensure the most rapid deployment of competitive DBS systems, the decision to cancel ACC's permit was undoubtedly counterproductive. Notwithstanding any delays that ACC -- like most other DBS permittees -- had experienced in implementing its authorization, ACC was clearly on the verge of providing a viable, competitive DBS system. Specifically, ACC had reached contractual agreements under which its authorization would have been assigned to another permittee, Tempo DBS, Inc., ("Tempo") and Tempo's augmented channel capacity would have been used by PRIMESTAR Partners L.P. ("PRIMESTAR") (which currently provides a medium-power direct-to-home satellite service) to provide a 200-channel service to consumers. The satellites to be used to provide this service would have been launched in 1996. No matter what rules and procedures the Commission may now adopt for reassigning ACC's channels, and no matter how stringent its due diligence rules for making use of the reassigned channels may be, the deployment of a

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2/ *See Continental Satellite Corp.*, 4 FCC Rcd 6292, 6299 (1989), *partial recon. denied*, 5 FCC Rcd 7421 (1990).

3/ *Advanced Communications Corp.*, FCC 95-428 (adopted Oct. 16, 1995) ("*ACC*").

new, competitive DBS system clearly will be delayed far beyond the date next year on which PRIMESTAR would have initiated its expanded service.

As a partner in PRIMESTAR, Cox is obviously dismayed at this setback to its ability to provide a competitive DBS service. Cox agrees with the Commission's determination that, if the cancellation of ACC's permit is upheld on appeal, the channels at issue should not simply be reallocated to the remaining permittees, but rather should be reassigned by auction. Cox is greatly concerned, however, that the Commission has proposed DBS auction rules that single out cable-affiliated DBS providers and impose on PRIMESTAR a unique set of unnecessary burdens and obligations that could impair its ability to obtain the available DBS channels or, if it does obtain the channels, to compete effectively with others in the marketplace -- even if PRIMESTAR would, in fact, be the most efficient and effective provider of DBS service.

In proposing these special burdens and obligations, the Commission is responding to the dual concerns, expressed by PRIMESTAR's competitors in the *ACC* proceeding, that cable-affiliated DBS systems "cannot be expected to compete vigorously with cable systems, and that such an entity would have the incentive and ability to engage in anti-competitive strategic conduct impeding other DBS providers who *are* competing with cable systems."[4/] The Commission's first concern appears to be that a cable-affiliated DBS operator will ignore competition from other DBS and multichannel providers and use its DBS channels simply to augment its affiliated terrestrial cable systems. The second is that cable-affiliated DBS operators will be able to persuade or coerce cable programming services to discriminate

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4/ *Notice* at ¶ 35 (emphasis in original).

unfairly against unaffiliated DBS operators or refuse to deal with such unaffiliated operators altogether.

As demonstrated below, there is no basis in fact or theory for these speculative concerns. In what promises to be -- and to some degree already is -- a vigorously competitive DBS marketplace, cable operators have neither the incentive nor the ability to operate affiliated DBS systems in anything but a fully competitive manner, as PRIMESTAR has been doing for the past several years in marketing its medium power DBS service. Cable programming services have incentives to deal with competitive DBS distributors -- and even if they did not, they would be compelled to do so on a non-discriminatory basis by existing regulations. These regulations, along with the antitrust laws, are fully capable of preventing any potential anti-competitive conduct without, at the same time, unduly hampering the ability of cable-affiliated DBS providers to compete fairly and efficiently in the video marketplace.

I. SPECTRUM AGGREGATION AND STRUCTURAL LIMITATIONS ON CABLE PARTICIPATION IN DBS

To allay concerns regarding excessive concentration among DBS operators, the Commission proposes to prohibit *any* DBS operator from owning more than 32 channels at any combination of orbital locations capable of full-CONUS service, with 90 days to divest any channels that have been acquired over that cap. Channels at the non-full-CONUS orbitals are exempt from this spectrum aggregation limitation.[5/]

5/ *Notice* at ¶¶ 42-43, 45.

In light of the concerns raised by some parties to the *ACC* proceeding, however, the Commission also proposes to impose further ownership restrictions on DBS operators affiliated with non-DBS multi-channel video program distributors ("MVPDs"). Specifically, those affiliated DBS operators would be permitted to control or use DBS channel assignments at only one of the orbital locations capable of full-CONUS transmission (1/4 of the full-CONUS channels).[6/] The Commission seeks comment as well on whether the ownership restriction should differentiate between DBS operators affiliated with cable operators and those affiliated with other types of MVPDs, and whether an even more stringent limitation should be placed on cable operators seeking to acquire DBS licenses.

Cox agrees with the Commission that the goal of promoting and protecting competition among DBS operators and between DBS and cable is legitimate and significant. But, concerns that cable-affiliated DBS systems may have the ability and incentive to impair such competition are misplaced. There simply is no need for more stringent treatment of cable-affiliated DBS systems with respect to ownership limits.

In order to promote competition among DBS operators, it may be reasonable to limit the number of channels available to *any* DBS operator, regardless of whether or not that operator is affiliated with a non-DBS MVPD. But once this limit is applied, it is hard to see how limiting cable-affiliated DBS providers to a single full-CONUS orbital location provides any additional pro-competitive benefits. The Commission suggests that this additional restriction "would ensure that no non-DBS MVPD could control or use more than one-quarter

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6/ DIRECTV and USSB already control all the channels at the 101° full-CONUS orbital.

of the DBS resources capable of full-CONUS service."[7] Yet, this explanation does not appear reasonable, because the Commission's general proposal already would limit *every* DBS operator, whether affiliated or not, to no more than one-quarter of the full-CONUS channels.

To the extent that the Commission's proposals to restrict availability of orbital locations to cable-affiliated DBS operators are meant to respond to concerns that a cable-owned DBS system will not compete vigorously with cable systems and other DBS providers, these concerns are misplaced As long as there is viable competition from a DBS service that is not affiliated with a cable operator, cable-affiliated DBS systems will have no incentive or ability to operate in a non-competitive manner. With the success of DIRECTV and USSB, it is too late for cable operators to foreclose DBS competition by acquiring DBS systems and shifting them from a competitive service to merely an adjunct of their terrestrial cable systems. Indeed, the Commission observes that for this reason "it may be unlikely that a DBS licensee or operator affiliated with a cable operator or another MVPD would be able to sustain a long-term strategy of avoiding head-to-head price competition."[8] Additionally, there soon will be three non-affiliated DBS providers, which will ensure that it is virtually impossible for cable-affiliated DBS operators to exert undue influence. The Commission and Congress already have rejected cable-DBS ownership and cross-ownership restrictions. Imposing such restrictions now, with two non-affiliated DBS licenses already providing service is wholly unnecessary, and, in light of the increased competition present in the DBS

7/ *Notice* at ¶ 40.

8/ *Notice* at ¶ 37.

market and the paucity of evidence of anti-competitiveness, would serve only to frustrate cable operators' ability to compete with the existing DBS providers.

Even in the unlikely event that the DBS market ever could devolve to the point where proposed acquisitions of DBS capacity would eliminate *all* non-affiliated DBS systems, the antitrust laws can deal fully and efficiently with any anti-competitive ramifications. And, of course, the Commission would be required to determine that the acquisition of additional DBS capacity served the public interest before any transfer could be consummated.[9/]

There also may be a significant downside to restricting cable operators' ability to acquire DBS channels. The Commission has recognized that consumers will reap significant benefits through the economies of scale that can be afforded if cable-DBS affiliations are wholly permissible. In fact, the Commission has specifically noted that "[cable] participation could well accelerate the initiation of DBS by bringing valuable marketplace experience, presence and possibly enhancing access to programming."[10/] In the absence of any reason to believe that anti-competitive conduct is likely to occur, there is no need -- or basis -- to discourage or limit such participation with its attendant benefits, at this point in the DBS industry's development.

9/ 47 U.S.C. § 309

10/ Continental Satellite Corp., 4 FCC Rcd at 6299.

II. CONDUCT RULES LIMITING CABLE INFLUENCE OVER DBS

The Commission notes that "[o]pponents of the proposed assignment of ACC's construction permit to Tempo DBS in the *Advanced Order* proceeding raised the concern that PRIMESTAR and/or Tempo DBS might seek to gain a competitive advantage over other DBS operators by using various vertical foreclosure strategies to limit access to or raise the price of programming".[11/] In response to these concerns, the Commission has proposed rules intended to protect non-affiliated systems from such anti-competitive conduct by cable-affiliated systems. Specifically, the Commission has proposed that no DBS operator shall sell, lease, or otherwise provide transponder capacity to any entity that enters into an arrangement with an MVPD granting the MVPD the exclusive right to distribute DBS services within, or adjacent to, its service area. Further, the Commission has proposed that no DBS operator shall contract with an entity that engages in conduct tantamount to granting that operator such exclusive distribution rights.

The theory advanced by PRIMESTAR's DBS competitors is that cable-owned programmers would refuse to negotiate with or discriminate against unaffiliated DBS operators, and that cable operators would use their supposed market power to force unaffiliated programmers to engage in similar refusals to deal and discriminatory conduct. But existing regulations and marketplace forces already effectively preclude such anti-competitive conduct. In any event, the antitrust laws are fully sufficient to deal with any such anti-competitive conduct that might arise. The only effect of more stringent restrictions

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11/ *Notice*, ¶57 (citing Oppositions of DIRECTV and EchoStar).

would be to prohibit wholly legitimate and pro-competitive arrangements between programmers and distributors

A. Vertically Integrated Programmers

There is no evidence that cable operators have caused their vertically integrated programmers to refuse to deal with or discriminate against unaffiliated DBS services. To the contrary, these programmers' services generally are available to currently existing DBS services.

It may well be the case that the vertically integrated entities have more to gain from distributing their programming via unaffiliated DBS systems, than from engaging in what are likely to be futile efforts to stifle DBS competition by withholding their programming. But whether or not this is the case, there is, in any event, no risk that vertically integrated, cable-owned DBS operators will engage in such anti-competitive conduct -- because the Commission's rules implementing the program access provisions of the Cable Consumer and Competition Act of 1992 prohibit it.[12/] These rules prohibit unfair competition and discrimination in access to vertically integrated program services, and provide a specific cause of action for aggrieved MVPDs such as DBS operators. Thus, even if a cable operator possessed the incentive to coerce a programmer in the manner the Commission fears, the program access rules strip the operator of the ability to carry out such a threat.

An additional ban on exclusive contracts and discriminatory conduct as they affect DBS operators thus would have no effect on anti-competitive conduct. It would, however, unnecessarily and unfortunately block *pro-competitive* vertical arrangements. As the

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12/ 47 U.S.C. § 628 (1995).

Commission explains in the *Notice*, even Congress has recognized that "exclusive programming contracts and cost-justified differences in prices can enhance competition among MVPDs and sought to ensure that such pro-competitive programming arrangements were not unduly circumscribed by the [Commission's] rules."[13/] The existing program access rules provide the Commission an opportunity to review, on a case-by-case basis, exclusive contracts and differential prices, terms and conditions, and to *permit* those contracts that it finds to be in the public interest. The additional rules proposed by the Commission appear not to do so.

B. Non-Integrated Programmers

There is also no evidence that cable operators have the ability to prevent unaffiliated programmers from dealing with competing MVPDs -- and there is plenty of evidence that they do not have such power. It appears that most significant non-integrated programmers (such as ESPN and the USA Network, now, for example) deal with cable operators' terrestrially-based competitors and already have contracted to provide programming to DIRECTV and USSB. This demonstrates that cable operators do not have sufficient control to extract concessions from non-integrated programmers.

This is not a surprising state of affairs. Programmers such as ESPN have their own countervailing incentives to deal with all distributors, including both DBS and cable, to increase the availability of and subscribers to their programming services. However, many non-integrated programmers presently are sufficiently unique and popular to have countervailing bargaining leverage of their own when negotiating with cable operators. Thus,

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13/ *Notice* at ¶ 59

any cable operator that attempted to condition terrestrial cable carriage upon the programmer's acceptance of an exclusive or unfair DBS agreement simply would not succeed.

In any event, any allegations of coercion or other anti-competitive conduct aimed at foreclosing DBS operators' access to non-integrated programming can be tested and resolved under the antitrust laws. Antitrust enforcement is superior to a blanket prohibition on exclusivity or discrimination, because it permits a balancing of the pro-competitive effects of such conduct.[14/]

CONCLUSION

The Commission should reject its policy of allocating reclaimed DBS channels among existing permittees. But, for the foregoing reasons, it should not adopt rules that impose special restrictions on cable-affiliated DBS operators or that provide special program access protections to DBS operators other than those affiliated with cable operators. The concerns expressed by competitors of PRIMESTAR -- at which the proposed rules are directed -- do not justify such restrictions. The realities of the marketplace and existing regulations already prevent anti-competitive conduct by cable-affiliated DBS operators. What the proposed rules would achieve is what PRIMESTAR's competitors seek. They simply would place cable-affiliated DBS operators such as PRIMESTAR at an unfair competitive disadvantage.

14/ A blanket prohibition might be appropriate if there were reason to believe that anti-competitive conduct would be widespread, necessitating a plethora of antitrust lawsuits. Here, however, there is no reason to suspect any, let alone widespread, foreclosure of access to programming to non-affiliated DBS operators. Denials of access to one of the handful of DBS providers are likely to be sufficiently rare that the costs of relying on antitrust enforcement will not be excessive.

Respectfully submitted,

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